

1 IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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4 ROGER BIRDBEAR, et al., )

5 Plaintiffs, )

6 vs. ) Case No.

7 THE UNITED STATES OF AMERICA, ) 16-75L

8 Defendant. )

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13 Suite 705

14 Howard T. Markey National Courts Building

15 717 Madison Place, N.W.

16 Washington, D.C.

17 Thursday, May 25, 2017

18 11:00 a.m.

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22 BEFORE: THE HONORABLE ELAINE D. KAPLAN

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25 Transcribed by: George Quade, CERT

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5/25/2017

1 APPEARANCES:

2 ON BEHALF OF THE PLAINTIFFS:

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22 ALSO PRESENT:

23 Holly Clement, Esq., Department of Interior

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1 P R O C E E D I N G S

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3 (Proceedings called to order at 11:00 a.m.)

4 THE COURT: Good morning, everyone. This is  
5 Birdbear v. The United States, Number 16-75. We're  
6 having a status conference. And could counsel please  
7 identify themselves for the record, starting with counsel  
8 for the Plaintiff.

9 MR. SMITH: Sure. This is David Smith, counsel  
10 for the Plaintiff. And I believe on the line also is  
11 Dustin Greene.

12 MR. GREENE: Yes, Your Honor.

13 THE COURT: Okay. All right, Mr. Greene.  
14 And for the Government?

15 MS. SCHWARZ: Yes. This is Jody Schwarz on  
16 behalf of the Government. Also with me is Holly Clement.  
17 She's an attorney with the Department of the Interior  
18 Solicitor's Office.

19 THE COURT: Okay. All right. Well, I got your  
20 joint status report, and it looks like things are moving  
21 along, you know, fairly smoothly, other than the question  
22 of the third-party subpoenas, which I'll get to in a  
23 second.

24 So am I right about that, Mr. Smith?

25 MR. SMITH: Yeah. Your Honor, I think things

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1 are moving along much more smoothly. We have sort of two  
2 areas of -- where we would like to see them move more  
3 smoothly, and we alluded to them in the -- in the status  
4 report. That has to do with the ESI agreement and the  
5 NIOGEMS database.

6 THE COURT: Mm-hmm.

7 MR. SMITH: We would like deadlines for getting  
8 that started. We've been trying to get the electronic  
9 discovery for some time, and I think it's been about a  
10 month and a half we've been working on simply terms and  
11 custodians, and we've generally agreed to all the terms.  
12 They just have to be put into Boolean format, and we  
13 suggested that should be started by mid-June. And as you  
14 can tell, the Government says that should be finalized in  
15 the next few months.

16 THE COURT: Mm-hmm.

17 MR. SMITH: Most of the discovery is  
18 electronic, and if we don't get it started now, we'll  
19 have problems getting it completed before the end of  
20 the discovery period, and particularly since a lot of  
21 the third parties are claiming that the Government  
22 has these records, we will never know that until we  
23 see them. And, so, we'd like to see what the Government  
24 has.

25 THE COURT: And, Ms. Schwarz -- oh, I'm sorry,

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1 Mr. Smith?

2 MR. SMITH: And I can also address the NIOGEMS  
3 database.

4 THE COURT: Okay.

5 MR. SMITH: That's the database that has a lot  
6 of the oil and gas information that's been discussed  
7 since, I believe, April. We asked that our expert be  
8 allowed to get there at the end of May. We've had  
9 discussions. There were issues. Apparently they had --  
10 the -- he would have to be placed at a standalone  
11 computer, and there are some confidentiality concerns.  
12 But we just would like a time when he can get in there  
13 and get started.

14 THE COURT: Okay. Ms. Schwarz, can you -- are  
15 you prepared to provide a time for both of those things,  
16 the custodian issue and the search terms, and also this  
17 issue about the access to the database?

18 MS. SCHWARZ: Your Honor, I'd like to address  
19 the ESI order and the custodians first.

20 THE COURT: Okay.

21 MS. SCHWARZ: I would like to be able to  
22 conclude that by mid-June. I know sometimes I have been  
23 optimistic in dates, but given the time -- the times that  
24 it takes to move things up the chain. As I've explained  
25 to Plaintiff, the ESI order isn't exactly impacted in

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1 this case, but it's also the general procedures that the  
2 Department of Justice follows.

3 THE COURT: Right.

4 MS. SCHWARZ: We are very close to being able  
5 to finalize the agreement. Our IT department is going  
6 through the Boolean search terms. They had some  
7 questions, so, you know, as to just how they would like  
8 to set up (inaudible) we haven't had a chance to speak  
9 with Plaintiff today, but we'd like to set up a further  
10 time to discuss kind of the refinement of the Boolean  
11 terms and have some of those search terms would work  
12 together.

13 THE COURT: Mm-hmm.

14 MS. SCHWARZ: I am optimistic that we will be  
15 able to finalize that by mid-June, but I would like to  
16 note that that has not prevented the production of, you  
17 know, voluminous amounts of electronic data that we have  
18 already provided to Plaintiff. The ESI generally goes to  
19 kind of the email searches that would be done, and the  
20 bulk of the information that Plaintiff has sought would  
21 not be contained in that information, but rather it's in  
22 all of the BLM data, the well data, that we have already  
23 provided to Plaintiff.

24 Second, as to the issue of NIOGEMS, as Mr.  
25 Smith has represented, we've been in discussion with

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1 Plaintiffs about that. There are confidentiality issues  
2 associated with accessing that database. We've had  
3 further discussions with the Department of Interior about  
4 accessing that. They've expressed some concerns with  
5 having someone with direct access to it, and they would  
6 prefer to work out an agreement with Plaintiffs similar  
7 to how Plaintiffs have used and accessed databases in the  
8 Tribal Trust cases.

9 So that's something that we need to discuss  
10 with Plaintiffs further. This is kind of new  
11 developments over this past week, so we haven't had an  
12 opportunity to approach Plaintiff with that, but there  
13 are issues with that. And one thing that we are sending  
14 over to Plaintiff today or tomorrow is a list of the  
15 search fields for Plaintiff to look at, and we're also  
16 going to be sending more requests in response to their  
17 discovery tomorrow.

18 THE COURT: Okay. Yes?

19 MR. SMITH: Your Honor --

20 THE COURT: Yeah?

21 MR. SMITH: Why don't we go ahead and have  
22 those discussions, and if we have any further concerns,  
23 we'll bring them to the attention of the Court.

24 THE COURT: Yeah, that's what I was going to  
25 suggest. It sounds like you'll be able to work through

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1 some of these issues hopefully without me trying to  
2 figure out the minutiae of it.

3 So I guess maybe what I'll have you all do is  
4 maybe provide me with a status report by the end of June  
5 so we can see where you are on both of these things and  
6 anything else, and I will look at the status report.  
7 We'll decide whether we need to have a status conference  
8 at that point.

9 And the other issue about the third-party  
10 subpoenas, I think what I'm going to do is I think I'm  
11 just going to set up a hearing on the motion to quash so  
12 I have a better understanding of the specific documents  
13 and the positions of the third parties. And, so, you  
14 should be hearing from my office, if you haven't already,  
15 to try to set up a date for that hearing on the motion to  
16 quash.

17 MR. SMITH: Okay.

18 THE COURT: Is there -- is there anything else  
19 we need to talk about?

20 MR. SMITH: Your Honor, I think that's it.

21 THE COURT: Okay. All right. Well, great.  
22 Then I'll hear from you guys by the end of June, and I  
23 may speak to you before then as well at the hearing on  
24 the motion to quash. Thank you very much.

25 MR. SMITH: Okay, thank you.



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1 THE COURT: All right. Bye-bye.  
2 (Whereupon, at 11:07 a.m., the hearing was  
3 adjourned.)  
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1 CERTIFICATE OF TRANSCRIBER

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3 I, George Quade, court-approved reporter,  
4 certify that the foregoing is a correct transcript from  
5 the official electronic sound recording of the  
6 proceedings in the above-titled matter.

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10 DATE: 6/8/2017 s/George Quade  
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